



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

December 17, 2012

James M. Iwanicki, P.E.
Engineer Manager
Marquette County Road Commission
1610 N Second Street
Ishpeming, MI 49849

Dear Mr. Iwanicki:

I am writing to address some questions raised by the Road Commission on a conference call with EPA and MDEQ on Friday, December 14, 2012, about the processes and procedures for possible issuance by MDEQ of a revised wetlands fill permit under Section 404 of the Clean Water Act relating to the construction of proposed Marquette County Road 595. I emphasize that, at this stage of the process, MDEQ, not EPA, is the permitting authority for a 404 permit for the County Road project.

As you know, on December 4, 2012, EPA withdrew the Agency's objection regarding the Road Commission's Alternatives Assessment for the County Road 595 project, but reaffirmed the Agency's objection relating to Minimization of Impacts and Compensatory Mitigation because of the adverse impacts County Road 595 would have on aquatic resources and wildlife. In an Attachment to the December 4, 2012, letter, EPA set out in detail requirements for minimization and mitigation plans that would be consistent with the Clean Water Act Section 404(b)(1) Guidelines and allow MDEQ to issue a valid 404 permit. MDEQ now has the authority and responsibility to either issue a revised permit that includes sufficient minimization and mitigation plans or to notify EPA that MDEQ intends to deny the permit, within the 30 days of receipt of EPA's December 4, 2012, notification, pursuant to Section 404(j) and 40 C.F.R. § 233.50(h)(2).

As the permit applicant, the Road Commission must work directly with the permitting authority -- MDEQ -- to develop a revised permit that includes the required minimization and mitigation plans. EPA will coordinate with MDEQ to review individual submittals on specific items relevant to a revised permit. However, it is not EPA's role to develop the minimization and mitigation plans or to write the permit.

A question was asked last Friday about the timing of a decision by EPA to approve or disapprove any revised permit that may be issued by MDEQ. Neither Section 404(j) nor the regulations at 40 C.F.R. § 233.50 require EPA to approve or disapprove a revised permit by the 30-day deadline that applies to MDEQ. If, within the 30-day period, MDEQ were to issue a revised

permit that included sufficient minimization and mitigation plans, the permit would constitute a valid 404 permit. If MDEQ were to issue a permit with insufficient minimization and mitigation plans, authority to process a 404 permit application would transfer to the Corps of Engineers, by operation of law, after expiration of the 30-day period. EPA intends to notify MDEQ as soon as possible after receipt of any revised permit whether the permit constitutes a valid 404 permit.

Another question was asked during the Friday conference call about what constitutes “issuance” of a permit by MDEQ. The federal regulations at 40 C.F.R § 233.50 do not define “issue a permit.” Therefore, it appears that this is a matter of State law.

The processes and procedures for issuance of a valid 404 permit by MDEQ are prescribed by the Clean Water Act and federal regulations. The Road Commission and all other interested parties need to be mindful that EPA and MDEQ must abide by these processes and procedures, and that any deviation from the required processes and procedures could create risks and uncertainty should there be a challenge to any subsequent permit issued by MDEQ.

If you have further questions, please call me at (312) 886-1499, or you may contact Associate Regional Counsel Reginald Pallesen at (312) 886-0555.

Sincerely,

/s/

Robert Kaplan
Regional Counsel